Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88-1750

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

EARLE A. DAISLEY,

Petitioner,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI [Rule 21(k)(iv]

Earle A. Daisley
5658-167 Stevens Forest Road
Columbia, Maryland 21045
(301) 992-9621

App. 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EARLE A. DAISLEY :

V. : CIVIL NO. HM-84-3216

GENERAL ELECTRIC
COMPANY :

...oOo...

M E M O R A N D U M

Pro se plaintiff Earle A. Daisley ("Daisley"), a black male, 55 years old at the time of the events at issue, brought this action after defendant General Electric Company ("GE") laid him off from its Jessup, Maryland office and did not offer him a new position in any other GE office. Daisley alleges race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and age

discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et seq. Pending before the Court is defendant's Motion for Summary Judgment, Paper No. 24.[1] Plaintiff filed his opposition. Paper No. 25. The Court has reviewed and considered the memoranda submitted by the parties, as well as all of the other documents in the Court file, and determines that no hearing is required. Local Rule 6. The Court finds that there are no genuine issues of material fact, and that the undisputed facts reveal that GE is entitled to summary judgment. The Court will grant GE's motion in a separate order.

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[1] This number is the docket entry number in the official Court file. For convenience, the Court will refer to documents by their docket entry numbers.

The Court's reasoning follows.

FACTUAL BACKGROUND[2]

Daisley began working with GE in 1972, as a clerk in its Philadelphia Credit and Collections office. In November of 1979, the Philadelphia office closed, and the Credit and Collections department moved to Jessup, Maryland. For this reorganization, GE offered all employees who wanted to transfer the opportunity to do so. Daisley accepted this offer and moved to Maryland. Plaintiff's troubles began immediately upon his arrival. Daisley did not live up to GE's expectations. Eventually, John Sheriff ("Sheriff"), Daisley's

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[2] The Court draws the information in this section from the combined memoranda submitted to this Court. None of this section should be construed as a ruling or a factual finding.

supervisor, recommended his termination. However, James Schlueter ("Schlueter"). manager of the Jessup office, noticed in Daisley's application that plaintiff had typing experience and recommended that instead of terminating Daisley, he be transferred to the Data Processing Unit. Unfortunately, in the Data Processing unit, Daisley did not work fast enough. He was counselled by John Borke ("Borke"), his supervisor, on several occasions. An interim performance goal was set for him, one that set a lower rate of productivity than that of his co-workers. However, he was not able to maintain this level of performance. Finally, on April 16, 1982, Borke gave him a performance evaluation which ranked him as unsatisfactory in

several categories. Daisley refused to sign the evaluation, and appealed it. However, the appeal was denied, and this unsatisfactory evaluation remained in Daisley's record.

On September 2, 1982, GE notified its employees at the Jessup offices that most of the offices would close down, and that the operations conducted there would be moved to other offices. The Credit and Collections office transferred to Melville, New York, and the Data Processing operation moved to Englewood Cliffs, New Jersey. The letter advised the employees that GE would not automatically transfer them, but that they could apply for jobs in the new locations. Daisley applied for jobs with both the Credit and Collections and Data Processing departments, but was hired by neither. The layoff actually

occurred on October 1, 1982. Daisley wrote on several occasions requesting jobs from GE, but GE never hired him for any subsequent work. Daisley then began the administrative proceedings that are a prerequisite for filing an action under Title VII and ADEA. When the EEOC determined that there was no reasonable cause to believe Daisley's allegations of race, sex and age discrimination, it issued Daisley a notice of his right to sue. Daisley then initiated this action.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate only when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On GE's motion,

the Court must view all facts and draw all inferences in the light most favorable to Daisley. U.S. v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). However, Daisley who has the burden of persuading the Court that GE intentionally discriminated against him,[3] still has the burden of demonstrating the existence of genuine issues of material fact to avoid the

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[3] Daisley, relying on United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), has concluded that he need not submit evidence of discriminatory intent on the part of GE. Paper No. 25, at pp.3, 11. Daisley has misread the case. Aikens holds, not that plaintiff need not prove intent, but that "[a]s in any lawsuit, plaintiff may prove his case by direct or circumstantial evidence." 460 U.S. at 714, n.3 (emphasis added); see Teamsters v. United States, 431 U.S. 324, 358 n.44, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) ("[T]he McDonnell Douglas formula does not require direct proof of discrimination")(emphasis added).

entry of summary judgment against him. Celotex Corporation v. Catrett, 477 U.S. 317, 322-3, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).[4] To do so, he may not rely on conclusory allegations, but must, as must any other plaintiff, provide the Court with evidence indicating the existence of these disputes of fact. International Woodworkers v. Chesapeake Bay Plywood Corporation, 659 F.2d 1259, 1271 (4th Cir. 1981).

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[4] Plaintiff argues that the Supreme Court's recent rulings in this case and in the case of Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) do not apply in his case, as neither of these were Title VII oe ADEA cases. Paper No. 25, at pp.8-9. Plaintiff is mistaken.

STANDARDS FOR TITLE VII

Although plaintiff does not specifically so state, he is alleging disparate treatment on account of race and/or sex. He must therefore prove that GE's discrimination against him on the basis of his race or sex was intentional. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); McKenzie v. Sawyer, 684 F.2d 62, 70 (D.C.Cir. 1982). The Supreme Court has delineated the three part allocation of burden of production for such disparate treatment cases. Plaintiff must first demonstrate a

prima facie case of intentional race and/or sex discrimination before he may go forward. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Burdine, supra., 450 U.S. 248, 252-253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). To accomplish this, plaintiff must produce enough evidence not only to permit the trier of fact to infer the fact at issue, but to mandate the entry of judgment in his favor if defendant fails to produce sufficient evidence to rebut. Burdine, supra., 450 U.S. at 254 n. 7; Flowers v. Crouch-Walker Corporation, 552 F.2d 1277, 1283 n. 4 (7th Cir. 1977). Plaintiff must show that he, as a member of a protected group, was "treated differently than other similarly situated individuals"

and that "no adequate [non-discriminatory] explanation for the different treatment" exists. Day v. Patapsco & Back Rivers Railroad Co., 504 F.Supp. 1301, 1310 (D. Md. 1981).

If Daisley establishes his prima facie case, GE must produce evidence of legitimate non-discriminatory reasons for its actions to rebut the presumption the prima facie case creates. Burdine, supra., 450 U.S. at 254-5. To prevail at trial, plaintiff must then demonstrate the pretextual nature of defendant's stated reasons. Burdine, supra., 450 U.S. at 255-256. The burden of persuasion rests at all times with the plaintiff. Burdine, 450 U.S. at 256.

Prima Facie Case for Discriminatory Discharge

Daisley makes his prima facie case by demonstrating:

(1) that he is a member of a protected group;

(2) that he had the necessary qualifications for his job;

(3) that GE discharged him; and

(4) that GE replaced him with someone from outside of the protected group.

McDonnell Douglas, supra., 411 U.S. at 802.[5]

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[5] McDonnell Douglas involved the failure to rehire the plaintiff after a layoff, and the prima facie case was developed accordingly. The Court specifically noted that the elements of a prima facie case would vary according to the situation. McDonnell Douglas, supra, 411 U.S. at 802 n.13.

Discriminatory Failure to Hire

To make a prima facie case of showing that GE's failure to hire him was because of discrimination, Daisley must show that:

(1) he is in a protected group;

(2) that he applied for a job for which he was qualified;

(3) that he was rejected; and

(4) that the company continued seeking further applicants with similar qualifications outside of the protected group.

McDonnell-Douglas Corp., supra., 411 U.S. at 802. As the Supreme Court noted in the later case of Teamsters, this formula varies according to the situation. 431 U.S. at 358. However, at a minimum, Daisley must show as part of his prima facie case that he was not rejected for

the two most common legitimate reasons: that he did not have the adequate qualifications or that there were no openings. Teamsters, supra., 431 U.S. at 358 n. 44.

STANDARDS FOR ADEA

To prevail on his ADEA cause of action, Daisley may proceed in one of two ways. The first is to show that, but for age discrimination against him, GE would not have taken the actions it took. Lovelace v. Sherwin-Williams, 681 F. 2d 230, 239 (4th Cir. 1982). "Alternatively, [he] may rely on the judicially created proof scheme for Title VII cases ... which has been adapted for application in ADEA litigation." EEOC v. Western Electric Co., Inc., 713 F.2d 1011, 1014 (4th Cir. 1983) (citations omitted). The use of the

Title VII scheme in ADEA cases was intended to ease the plaintiff's burden of showing discrimination under ordinary principles of proof. Goldberg v. B. Green & Co., Inc., 836 F.2d 845, 849 (4th Cir. 1988). Because in the instant case plaintiff would not prevail under either scheme, the Court need not determine which would be the most appropriate.

APPLICATION OF STANDARDS TO FACTS

The only issue before the Court is whether GE discriminated against plaintiff because of his race, sex or age. Daisley has provided the Court with several documents that include lengthy and detailed narratives of every woe that GE ever caused him. Plaintiff's August 10, 1984 "position statement" attached to his

Complaint, Paper No. 1; Plaintiff's Complaint, Paper No. 5;[6] Plaintiff's Pre-trial Narrative Statement, Paper No. 7; and Plaintiff's Additional Brief and Documentation on Summary Judgment Motion Ordered by U.S. District Court Judge Herbert F. Murray; Submission of, Paper No. 9. Virtually none of it is relevant to the issues before the Court. In most of his discussion, plaintiff only occasionally interjects the words "racism" or "discrimination" when someone at GE has taken an action with which he disagrees, making conclusory allegations without factual support. Most of the actions of

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[6] This was Daisley's second complaint filed. GE construed this as an amended complaint, and moved to dismiss it. Paper No.6. The Court denied GE's motion in its Memorandum and Order of November 25, 1987.

which he complains occurred prior to July 20, 1982. In its Memorandum and Order dated November 25, 1987, the Court ruled that Daisley could only recover for discriminatory acts, if any, by GE on or after July 20, 1982.[7] The Court concluded that Daisley could challenge only the layoff from Jessup and GE's subsequent failure to hire him.

Plaintiff disputes several facts, most significantly GE's assessment of him as unqualified. GE has submitted to this Court concrete evidence in the form of

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[7] Even were the Court to determine that events prior to July 20, 1982 were relevant in creating an inference of discrimination on the part of GE, Daisley's submissions do nothing to advance such an inference.

documents and affidavits. Daisley's response has been to submit little evidence of his own but to rely on the same evidence submitted by GE and to argue that it reveals the conspiracy of lies practiced by GE. The documentary record is therefore crystal clear, and the Court finds that Daisley's conclusory allegations, unsupported by any evidence, do not serve to create genuine issues of fact.

Prima Facie Case

For both Daisley's layoff from the Jessup office and GE's failure to rehire him, under both Title VII and ADEA, plaintiff must show as part of his prima facie case that he possessed the qualifications for the job. The Court finds that the undisputed evidence in

this case reveals that Daisley cannot do this. Daisley began at Jessup as a Grade 12 Credit and Collection Clerk. Affidavit of James A. Schlueter ("Schlueter Aff."), attached as Exhibit 2 to defendant's Motion for Summary Judgment. Daisley's supervisor in Credit and Collections, Sheriff, began to have concerns about Daisley's productivity in early 1980. The notes made by the two supervisors are attached as Exhibit 1 to the Affidavit of Schlueter. Schlueter and Sheriff agreed to re-assign Daisley to an easier Grade 8 job, rather than continue him in the Grade 12 job, but without reducing his salary. Schlueter Aff., Par. 5. In spite of this change, Daisley still could not perform as speedily as expected.

Sheriff and Dave Nicholson ("Nicholson"), Daisley's immediate supervisor in the Grade 8 position, recommended that he be discharged, and advised Daisley of this recommendation. Schlueter Aff., Par. 5; Sheriff'a and Nicholson's notes of meetings with Daisley on 3/13/80, 3/21/80 and 4/16/80, attached to Exhibit 1 to Schlueter Aff. Schlueter communicated this information to Bill Kroekel, his supervisor, on May 16, 1980, and also recommended that Daisley be discharged. Schlueter Aff., Par. 5 and Exhibit 1. Subsequently Schlueter noticed on Daisley's application that he had typing experience, and decided that, rather than terminate him, GE would transfer him to the Data Processing unit at Jessup. Schlueter Aff., Par. 6.

Daisley accepted the Grade 6 position as Terminet operator, transferred in September 1980, and continued to receive his Grade 12 salary. Schlueter Aff., Par. 6. However, in his position as Terminet operator, Daisley had problems with low productivity and high rate of errors. Affidavit of James E. Borke ("Borke Aff."), Par. 3. The Terminet computer itself kept records of the number of characters entered daily, so that Borke was able to ascertain that Daisley's productivity was lower than that of the other two operators. Borke Aff., Par. 4, 5. Borke advised Joan Garver Hoye ("Hoye"), Personnel Manager for GE's Washington region, in 1981. Affidavit of Joan Garver Hoye ("Hoye Aff."), Par. 3. Hoye reviewed Daisley's employment records, and

submitted them all with a letter to Bill Fishback, her supervisor. Hoye Aff., Par. 3. Hoye and Borke met and decided that Borke should establish a production goal for Daisley. Hoye Aff., Par. 4. Borke met with Daisley to discuss these problems on April 15, 1981. The result of the meeting was that Borke advised plaintiff that he must meet an interim goal of entering 52,000 characters per day, without working any overtime. Borke Aff., Par. 5, 6; Borke's notes of this meeting attached to Exhibit 2 to Hoye Aff.

Daisley was able to meet this goal only rately. Generally his weekly average number of characters entered fell below this goal, sometimes by as much as 22,000 characters. Borke Aff., Par. 7; Earle's productivity record

from 4/17/81 through 4/23/82, attached as Exhibit 2 to Borke Aff.; Data Input Productivity Record 1981, attached as Exhibit 5 to Borke Aff. During the summer of 1981, Borke learned that Daisley was working overtime without authorization. Concerned about potential problems with wage and hour laws, Borke sent plaintiff a memo advising him not to work overtime. Borke Aff., Par. 8; Exhibit 3 to Borke Aff.

Hoye continued to monitor Daisley's performance and, seeing that it did not improve, she wrote a letter to supervisor C. R. Greer on December 29, 1981. In this letter, she stated:

> Among alternatives we have considered are going with a performance case and/or offering Mr. Daisley the opportunity to take a lack of work with the possibility of an IEA lump sum payment.

> I feel if Mr. Daisley is going to be an employee over a continued period of time, we must get his pay in line with that of Grade 6 jobs.

Hoye Aff., Par. 5; letter attached as Exhibit 2 to Hoye Aff.

On April 16, 1982, Borke drafted, and Hoye reviewed and approved, a performance evaluation of Daisley. Although he rated Daisley as "Fully Satisfactory" in the categories of Dependability and Responsibility, he ranked him as "Unsatisfactory" in 3 of the 4 other categories, and gave an overall evaluation of Unsatisfactory. Hoye Aff., Par. 6; Borke Aff., Par. 9; Evaluation attached as Exhibit 4 to Borke Aff. and Exhibit 3 to Hoye Aff. Daisley refused to sign the evaluation, and requested the opportunity to appeal it. Borke explained that he should do so through Garver and John Girard ("Girard"),

Borke's supervisor. Borke Aff., Par. 11. On May 10, 1982, Hoye met with Daisley regarding the evaluation. She states that Daisley refused to accept the evaluation, and that he wanted to meet with Girard. She arranged the meeting with Girard, and arranged for Girard to review Daisley's productivity records. Girard met with Daisley, but did not change the evaluation or remove it from Daisley's personnel file.[8] Hoye Aff., Par. 7; Hoye's letter to Girard attached as Exhibit No. 5. When, after the Jessup office was closed, Daisley applied for a job in Melville, New York, Joseph A. Barbera, the Manager of Data Input,

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[8] Plaintiff alleges, without evidentiary back-up, that his appeal of this evaluation was successful. Paper No. 5, Par. 47 (Paper No. 5 adopted as an accurate statement of the facts in Paper No. 25).

decided not to offer him a job on the basis of this unsatisfactory evaluation. Affidavit of Joseph A. Barbera, Par. 4. Boniface J. Santoro, at the time Manager of the Credit and Collections Department in Englewood Cliffs, relied on his interview with Daisley, Sheriff's statement that he could not recommend Daisley for the job because of poor productivity, the fact that Daisley had not worked in Credit and Collection for the preceding two years, and Daisley's work record to determine that he would not offer Daisley a position in New York. Affidavit of Boniface J. Santoro, Par. 4, 5, 6.[9]

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[9] Santoro sent Daisley a letter saying that he was not qualified as a Grade 12 credit and collections representative. Daisley's November 5, 1982 letter to Santoro rebutting Santoro's allegedly inaccurate assessment of his abilities does nothing to advance Daisley's case.

Daisley's response to GE's thoroughly documented record of the employment problems it had with him is to simply deny the reality of any of it, and to accuse all involved, including GE's attorneys and even the court reporter who recorded his deposition,[10] of conducting a conspiracy to force him out of employment for the purpose of replacing him with young white female employees.[11]

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[10] Because Daisley refused to sign the deposition, and because in the first three pages of his opposition to the motion for summary judgment he discusses all of the reasons why the deposition is inaccurate, the Court chooses to disregard the deposition testimony. The Court notes that this is not a finding that there were irregularities or dishonesty of any kind in the conducting of the deposition.

[11] According to Daisley, this conspiracy began on April 12, 1980, when he complained to an organization in Philadelphia called the Opportunities Industrialization Center ("OIC") about the unfair treatment he was receiving at the hands of GE. This letter is attached as an

Throughout his memoranda Daisley continually refers to the "inaccurate and false evaluation" of April 16, 1981.

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11 (Cont'd) Exhibit to Paper No. 5. Since that time, he alleges:

> the Defendant Company has pursued a policy of manipulating job assignments, discrediting the workmanship and performance of the Plaintiff, surreptitiously monitoring of the Plaintiff's performance, resulting in surreptitious demotions without the Plaintiff being informed that the the jobs being performed were actually demotions. This policy was intended as punishment for the Plaintiff. The inaccurate job evaluation given to the Plaintiff by James E. Borke on 4/16/82 was the consummation of this policy. Paper No. 25 at p. 5.
>
> They embarked on a course to discredit the Plaintiff which ultimately reached into the headquarters at Louisville, Kentucky. Paper No. 25 at p. 6.

However, as Daisley outlines in the 4/12/80 letter the exact type of treatment that he complains of receiving later, it is difficult to believe his contention that GE was motivated in any fashion by this letter. In Paper No. 9, at page 15, Daisley states that he submits the letter to OIC to the Court to show intent by the defendant to discriminate. However, GE

In fact, one item of relief that he seeks from the Court is to have his record cleared of this false evaluation. Paper No. 1; Paper No. 5; Paper No. 9; Paper No. 25.[12] He maintains over and over again that his performance was excellent, and lists all of the reasons he thinks so.[13] Supervisors and employees

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11 (Cont'd) had nothing to do with writing that document, and it only reveals plaintiff's state of mind. Therefore, it is simply not probative of GE's intent to do anything.

12 The Court finds that the record reveals that this evaluation was not done for any discriminatory reason, nor was it done in a discriminatory manner. However, even if it had been, because the evaluation was conducted on April 16, 1982, the Court could not grant plaintiff any relief, as this occurred before the cut-off date of July 20, 1982.

13 For example, he states:

The fact is that the charging party has maintained an exemplary performance and attendance record with the General

frequently disagree over the performance of employees. When this disagreement becomes relevant to employment discrimination litigation, it is well-established law that the perception of the employer, and not that of the employee, controls

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13 (Cont'd) Electric Company for a period of ten (10) years. This signal accomplishment cannot be refuted by false, glib, abstract phrases. Plaintiff's August 10, 1984 position statement to EEOC, adopted in Paper No. 25 as an accurate statement of the facts.

Plaintiff became organized, productive, efficient and proficient as a Terminet operator. Paper No. 5, Par. 35, adopted in Paper No. 25 as an accurate statement of the facts.

Plaintiff avers that he did not fail, but continued to excel as a Terminet operator until he was laid off on October 1, 1982. Paper No. 5, Par. 46.

The General Electric Company [sic] own files bear out the fact that Earle A. Daisley was innovative, resourceful and quick thinking to remove cumbersome ways of doing things to increase productivity. Rather than complain Daisley changed the system in order that the work could be efficiently expedited. Paper No. 25, p.5.

any decision regarding the qualifications of the employee. Goldberg v. B. Green & Co., 836 F.2d 845, 848 (4th Cir. 1988); Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980).

Daisley also maintains that he has evidence from GE's files which proves that he is an excellent employee. Paper No. 5, Par. 50. However, all he has provided to the Court are a 1973-1974 performance evaluation from his supervisor in Philadelphia, which ranked him as "Excellent" in some categories and "Good" in others,[14] the positive comments made on his 1971 application to GE, the

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[14] The Court notes that Daisley was not completely happy with this review either. He wrote a letter to his supervisor stating that he felt he should be rated better than "Good" in those categories. Letter dated September 9, 1974, attached as Exhibit 2 to Paper No. 9.

fact that his transfer to Jessup was based in part on merit, an October 5, 1981 memo from the Regional Parts Manager congratulating the entire office on a job well done, and Garver's comments to Greer in the December 29, 1981 letter about his being a dedicated and cooperative employee. With respect to the first two, the Court notes that they were issued 11 and 8 years before the events involved here, and were done by different people with different expectations. They are not therefore probative of plaintiff's qualifications in 1979 through 1982 under different supervisors. Because the information on the 1979 transfer order was prepared by different supervisors with different expectations, it does not change the problems with Daisley's productivity experienced by the Jessup staff.

With regard to the October 5, 1981 memo, as it does not provide information about Daisley specifically, it is not relevant to the issues in this case. Finally, whether Daisley was a dedicated and cooperative employee is not the issue in this case. Unfortunately, he did not live up to the expectations of the Jessup supervisors or of Santoro or Barbera for productivity. Further, with respect to the discriminatory discharge case, one element of a prima facie case is that plaintiff was replaced by those outside of the protected groups of which he was a member. Because the jobs of all but three people at Jessup were completely terminated, no one replaced plaintiff. Plaintiff argues that the office was not closed, but was transferred, and

that he was denied his "bumping rights." Again, he presented no evidence to support that other than his belief that such was the case. The Court's examination of the documents submitted by both sides reveals that GE did not offer to transfer all employees, as it had done in 1979 when it transferred plaintiff's department from Philadelphia to Jessup. September 1, 1982 letter, Schlueter to Daisley, attached as Exhibit 2 to Schlueter Aff.; September 28, 1982 memo, Daisley to Schlueter, attached as Exhibit 3 to Schlueter Aff. With respect to his "bumping rights", the Court's review of GE's policy statement regarding reductions in force, issued February 1, 1981, and attached as Exhibit 6 to Hoye Aff., reveals that these rights exist only when a senior employee can exercise them in the same

city in which he or she is working. Simply put, Daisley had no bumping rights in Melville, New York or Englewood Cliffs, New Jersey.

With respect to the alternate method of proof in ADEA, that of reviewing the case as any other, the Court finds that Daisley has not created any genuine disputes of material fact as to whether GE discriminated against him on the basis of age. The Court finds that the record as a whole reveals that GE did not at any juncture treat Daisley in a discriminatory manner. Daisley was 45 years old at the time GE hired him in Philadelphia, within the age group specifically targeted for protection by ADEA. In addition, GE had noreason to resort to a conspiracy to force plaintiff out of employment. GE could simply have

fired plaintiff because of his well-documented poor performance. Instead of so doing in March of 1980, as originally planned, Schlueter investigated and discovered a way to keep Daisley in GE's employ. The Court finds that the most reasonable inference from the record in front of it is that GE did the most that it could reasonably have been expected to do to keep plaintiff working.

For all of the reasons outlined above, the Court finds that Daisley has not shown that a dispute exists as to any material fact, nor has he made out a prima facie case of race, sex or age discrimination in his layoff or the failure to hire him at the next location.

Accordingly, the Court will enter summary judgment for GE in a separate order.

Dated: May 9th, 1988

/s/ Herbert F. Murray
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EARLE A. DAISLEY :

V. : CIVIL NO. HM-84-3216

GENERAL ELECTRIC COMPANY :

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O R D E R

In accordance with the foregoing Memorandum, it is this 9th day of May, 1988, by the United States District Court for the District of Maryland,

ORDERED:

(1) that defendant General Electric Company's Motion for Summary Judgment, Paper No. 24, be, and the same hereby is, Granted;

(2) that judgment be, and the same

hereby is, Entered in favor of defendant and against plaintiff; and

(3) that the Clerk of the Court shall mail a copy of this Order with the accompanying Memorandum to the parties.

/s/ Herbert F. Murray
United States District Judge

Appendix to
Petition for Certiorari
[Rule 21(k)(iv)]

District Court Memorandum dated May 9, 1988 - District Court Order dated May 9, 1988 granting summary judgment in favor of defendant and against plaintiff. (Appendix, infra, pp. App. 7-45). Memorandum and Order of District Court dated February 10, 1988. (Appendix, infra, pp. App. 46-50). District Court Memorandum and Order dated November 25, 1987 denying defendant's Motion to Dismiss or, in the Alternative Motion for Summary Judgment. (Appendix, infra, pp. App. 51-64). Appendix 1-6 submitted in Petition for Certiorari (pg. 5 under the heading "Opinions Below").

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EARLE A. DAISLEY :

V. : CIVIL NO. HM-84-3216

GENERAL ELECTRIC
COMPANY :

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MEMORANDUM AND ORDER

Plaintiff in the instant case filed Plaintiff's Request to Be Excused from Depositions, Interrogatories and Production of Records, Paper No. 14. In his request, he explains that he is currently on probation at his new job, and does not wish to jeopardize it. He also invokes the attorney work-product privilege.

The Court finds first that the attorney work-product privilege does not extend to cover the factual information upon which plaintiff bases his claim, and

about which defendant requests discovery. The Court will deny plaintiff's request on this basis. Second, the Court notes that it was plaintiff who came to this Court asking it to grant relief on his behalf. If he wants this Court to review his case, he must comply with the rules of the Court. One of them is that he must provide the other side with discovery. Federal Rules of Civil Procedure 26-36; Local Rules 6 and 6A. The sanctions for failing to do so could include dismissal of his case. Federal Rule of Civil Procedure 37. To the extent he has specific objections to specific interrogatories, specific document requests, or specific questions put to him at the deposition, he may object to them using the procedure outlined in Local Rules 6 and 34, and the Court will consider those specific objections. The Court will not excuse plaintiff's participation in

discovery, and thus will deny his request.

The Court will consider a postponement of the Scheduling Order, so as to avoid jeopardizing plaintiff's job during his ninety-day probationary period. Should plaintiff desire such a postponement, he shall advise the Court by letter within fifteen days from the date of the signing of this Memorandum and Order. Otherwise, the Court will grant an extension of the discovery period, during which plaintiff must comply with discovery or risk dismissal of his case, and will retain the trial date.

Immediately before signing this Memorandum and Order, the Court's attention was brought to the fact that defendant has just filed Defendant's Motion for an Order Compelling Discovery. Because the Court has denied plaintiff's request to be excused from discovery, the Court views

defendant's motion to compel discovery as moot. The Court will deny it for that reason, without prejudice to its renewal at a later time should further difficulties arise.

Plaintiff has also requested that an attorney be appointed to represent him. The Court will deny the request at this stage of the litigation. Plaintiff, although pro se, has so far been able to adequately comprehend the issues in his case. The Court will consider the request again after its ruling on any summary judgment motions filed after the conclusion of discovery or, if no such motions are filed, at the conclusion of discovery.

Accordingly, it is this 10th day of February, 1988, by the United States District Court for the District of Maryland,

ORDERED:

(1) that plaintiff's Request To Be

Excused from Depositions, Interrogatories and Production of Records, Paper No. 14 be, and the same hereby is, Denied;

(2) that defendant's Motion for an Order Compelling Discovery be, and the same hereby is, Denied without prejudice to its renewal at a later date;

(3) that plaintiff's request for appointment of an attorney be, and the same hereby is, Denied; and

(4) that the Clerk of the Court shall mail a copy of this Memorandum and Order to the parties.

/s/ Herbert F. Murray
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EARLE A. DAISLEY :

V. : CIVIL NO. HM-84-3216

GENERAL ELECTRIC CO. :

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MEMORANDUM AND ORDER

Pro se plaintiff Earle A. Daisley ("Daisley") filed this complaint after being laid off by defendant General Electric Company ("GE"). He alleges race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended 1972, and age discrimination in violation of the Age Discrimination in Employment Act ("ADEA") of 1967, 29 U.S.C. §621 et seq. Pending before the court are: (1) Defendant's Motion

to Dismiss or, in the Alternative, for Summary Judgment, Paper No. 3;[1] and (2) General Electric Company's Motion to Dismiss Amended Complaint, Paper No. 6. The Court has reviewed the memoranda submitted by the parties and has determined that no hearing is required. Local Rule 6. The Court is now prepared to rule.

Factual Background[2]

Daisley began working with GE in 1972, as a clerk in the Philadelphia Credit and Collections office. In November of 1974, he received a performance

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[1]This number refers to the docket entry number in the official court file.

[2]For the purposes of a Motion to Dismiss the Court accepts all of the plaintiff's allegations as true. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 1848, 23 L.Ed.2d 404 (1969).

evaluation which ranked him as either good or excellent in all categories. In November of 1979, the Credit and Collections department moved to Jessup, Maryland. Daisley transferred with the Department. Immediately upon his arrival, John Sheriff ("Sheriff"), the supervisor of the Credit and Collections Bureau began to assign him a much bigger workload than all other similarly situated white employees. In spite of the fact that Daisley kept up with his work, in September, 1980 GE abruptly transferred him to the Data Processing Unit, an area in which he had no training. Daisley alleges that this transfer was punitive and designed to humiliate him and force him out of employment. Through the intervention of a co-worker who trained him voluntarily, Daisley learned how to keypunch. However, the company continued to file complaints

about low productivity against him. On April 16, 1982, Jim Borke ("Borke") gave him a performance evaluation which ranked him as unsatisfactory in several categories, although it did list him as satisfactory in other categories. Daisley refused to sign the evaluation and discussed it with management. As far as Daisley knows, no further action was taken on this evaluation. On September 2, 1982, several employees were notified that the Credit and Collections Bureau would be moving its operations to Melville, New York. Further, the Data Processing Unit would be moving the bulk of its operations to Englewood Cliffs, New Jersey. The letter advised them that they would not be transferred, but that they could apply for the jobs. The layoff actually occurred on October 2, 1982. Daisley applied for both jobs but was

rejected by both departments. He wrote on other occasions requesting jobs from GE. All letters were met with negative responses. He then filed a complaint with the Howard County Maryland Office of Human Rights ("OHR") on March 25, 1983. OHR closed his complaint without taking any action, and transmitted the case to the Equal Employment Opportunity Commission ("EEOC") on May 16, 1983. On May 24, 1984, EEOC found no probable cause to believe that GE's actions were the result of race or sex discrimination, closed its consideration of the age discrimination complaint, and issued plaintiff a right to sue letter. Plaintiff then initiated this litigation on August 20, 1984.

Plaintiff's Amended Complaint

Plaintiff filed a second complaint after defendant had filed its motion to

dismiss. Fed.R.Civ.P. 15(a) permits amendment of the complaint as of right before the filing of a responsive pleading. As a motion to dismiss is not a responsive pleading, Smith v. Blackledge, 451 F.2d 1201, 1203 n. 2 (4th Cir. 1971); Walgren v. Howes, 482 F. 2d 95, 96 n. 1 (1st Cir. 1973), the Court will accept plaintiff's amended complaint.

The complaint appears to the court to be, in addition to an amended complaint, a response to the motion to dismiss, and the court in addressing the motion to dismiss has considered the arguments advanced by plaintiff.

Defendant's Motion to Dismiss[3]

Title VII

Defendant argues in its motion that

In Paper No. 6, its response to plaintiff's amended complaint, defendant adopts the arguments advanced in its Paper No. 3, without raising any further arguments. The Court will address the two motions as one.

plaintiff may not bring his Title VII complaint because he failed to file any charge of discrimination with the appropriate state agency within 180 days from the alleged acts of discrimination, as required by the Maryland statute. Md. Ann. Cod. Art. 49B Section 9(a). Because the Court believes that Daisley is entitled to the longer 300 day period permitted in Section 706(e) of Title VII, 42 U.S.C. Section 2000e - 5(e), the Court will deny the motion for any acts of discrimination alleged to have occurred within the 300 days prior to May 16, 1983, when EEOC received the charge. This time period, which begins July 20, 1982, includes both September 2, 1982 and October 2, 1982, obviating the need for the Court's resolution of the parties' dispute over when plaintiff's cause of action accrued.

Section 706(e) reads, in relevant part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice. . . such charge shall be filed by or on behalf of the person aggrieved within three hundred daysafter the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier . . .

In 1980, the Supreme Court ruled that nothing in Section 706(e) required plaintiff to file the complaint with the state agency within 180 days to trigger the longer limitation period. Mohasco v. Silver, 447 U.S. 807, 814 n.16, 816 n.19, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980).

Since the Mohasco decision, judges in this District have disagreed on whether a plaintiff must file a charge with the state agency within the time limit specified by the state to receive the benefit of the 300 days. See e.g. Soble v. University of Maryland, 572 F.Supp 1509, 1514 (D. Md. 1983) (Miller, J.) (grievant in state with state agency need not file charge within state limitations period to receive benefit of extended limitations period for EEOC filing); Haller v. Butler Shoe Corp., 595 F.Supp 998, 1000 (D. Md. 1984) (Northrop, J.) (plaintiff entitled to longer period of limitations in states with state agencies); contra. Borowski v. Vitro Corp., 634 F.Supp 252, 256-57 (D. Md. 1986) (Motz, J.) (timely state filing is a prerequisite for the longer limitations period). The Court of Appeals for the Fourth Circuit has

expressly reserved decision on this issue. Dixon v. Westinghouse Electric Corp., 787 F.2d 943, 945 n.2 (4th Cir. 1986).

This Court, in reviewing the cases, believes that the approach adopted in the Haller and Soble decisions is the correct one. Many TitleVII plaintiffs file their own charges and complaints without benefit of legal advice. Smith v. Oral Roberts Evangelistic Ass'n., 731 F.2d 684, 687 (10th Cir. 1984). The plain language of the statute provides their primary guidance. As Congress wrote this section without mention of or reference to state statutes of limitations, this Court will not imply this additional requirement. Mohasco, supra., 447 U.S. at 816 n.19.

The Court notes that a number of other courts of appeals have reached the same conclusion. Smith, supra, 731 F.2d at 690; Jones v. Airco Carbide Chemical Co.,

691 F.2d 1200, 1203 (6th Cir. 1982); Owens v. Ramsey Corp., 656 F.2d 340, 342 (8th Cir. 1981); Wiltshire v. Standard Oil Co., 652 F.2d 837, 839 (2d Cir. 1981), cert. denied 455 U.S. 1034, 102 S.Ct. 1737 (1982). Further in 1981, EEOC adopted a regulation that states that "[c]harges arising in jurisdictions having a 706 agency but which charges are apparently untimely under the applicable state statute of limitations . . . are timely filed by the Commission within 300 days from the date of the alleged violation" 29 C.F.R. 1601-13(a).

The Court finds additional support for its position in the Supreme Court's ruling that under ADEA, the complainant has 300 days to file a charge with the EEOC even when the plaintiff did not file a timely charge with a state or local EEO agency. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 759, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1976).

The Supreme Court has noted the similarity of language and purpose of the ADEA and these sections of Title VII. Soble, supra, 572 F. Supp at 1513, citing Zipes v. Transworld Airlines, Inc., 455 U.S. 385, 395 n.11, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982); Oscar Mayer, supra, 441 U.S. at 756.

ADEA

As noted above, the ADEA limitations period is 300 days, regardless of the filing date with the state agency. Oscar Mayer, supra, 441 U.S. at 759. Defendant does not contest this time, but argues that much of the alleged discrimination which plaintiff challenges occurred before that date. The Court agrees.

Accordingly, the Court will permit plaintiff's Title VII and ADEA cause of action to proceed with respect to all acts of discrimination which occurred within the 300 days prior to May 16, 1983,

that is, on or after July 20, 1982. After a study of plaintiff's lengthy complaint and subsequent memoranda, the Court concludes that plaintiff may challenge only his layoff and GE's subsequent failure to place him in another job and may not challenge the alleged harassment which took place after his move to Jessup and after his transfer into the Data Processing Department.

In accordance with the foregoing memorandum, it is this 25th day of November, 1987 by the United States District Court for the District of Maryland ORDERED

(1) that defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, Paper No. 3, be, and the same hereby is, Denied with respect to alleged acts of discrimination occurring on or after July 20, 1982, and Granted

with respect to alleged acts of discrimination occurring prior to July 20, 1982;

(2) that the defendant file its answer to plaintiff's complaint within 20 days from the signing of this Order; and

(3) that the Clerk of the Court shall mail copies of this Memorandum and Order to all parties.

/s/ Herbert F. Murray
United States District Judge